88-1672

No.

MAR 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

BETSY ACOSTA,

Petitioner,

vs.

DR. LOUIS SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RAFAEL CARRERAS-VALLE
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QUESTIONS PRESENTED

1. Does the Federal Court of Appeals err when they violate the due process of law to the petitioner denying her opportunity to review decision she is entitled to in the same manner as other Social Security disability cases?

2. Does the Court below err by holding that the Secretary's denial of petitioner's Social Security Disability Benefits is supported by substantial evidence?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Betsy Acosta, and respondent, Secretary of Health and Human Services, Dr. Louis Sullivan, represented by Honorable William C. Bryson, Acting Solicitor General, Department of Justice, Washington, D.C. 20530. Pursuant to the Social Security Act, he is responsible for the determination of disability under Title II disability programs, including the promulgation of standards, determination of whether a claimant is disabled within the meaning of the Social Security Act, as amended.

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NO. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BETSY ACOSTA,

Petitioner,

V.

DR. LOUIS SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Betsy Acosta, respectfully prays to this Court that a writ of certiorari be issued to review the order of the United States Court of Appeals for the First Circuit entered in this case on August 29, 1988. Petition for Rehearing was denied on October 25, 1988. Motion for Reconsideration for rehearing en banc was denied on December 16, 1988.

OPINIONS BELOW

The Order of the Court of Appeals, not for publication, Civil Action Number 88-1057, is reprinted in the Appendix hereto, p. 1(a), 9 pages, infra.

The Order of the Petition for Rehearing pursuant to Rule 40, Rules of Appellate Procedure, is reprinted in the Appendix hereto, p.10(a), 2 pages, infra.

The Order of the Motion for Reconsideration for rehearing en banc, is reprinted in the Appendix hereto, p.12(a), 1 page, infra.

On October 7, 1987 the United States District Court of the District of Puerto Rico rendered an Order affirming the Secretary's decision denying petitioner her Widow Disability Insurance Benefits. Civil Action No. 87-0498(J.A.F.), is reprinted in the Appendix hereto, p.13(a)-14, 2 pages, infra.

Judgment entered same date, is reprinted in the Appendix hereto, p. 15(a), 1 page, infra. Federal Rules of Civil Procedure 79(a).

On October 8, 1986 the Administrative Law Judge before whom a hearing was held on October 3, 1986, rendered a notice of decision-denial. He found that Mrs. Acosta impairments do not meet or equal an impairment listed in Appendix I, Subpart P, Regulations No. 4, Secretary's Regulations. It is reprinted in the Appendix hereto, p. 16(a)-22, 7 pages, infra.

The Administrative Law Judge's denial decision became the final decision of the Secretary of Health and Human Services, when the Appeals Council on February 24, 1987 sustained the denial decision of the Administrative Law Judge. It is reprinted in the Appendix hereto, p. 23(a)-25, 3 pages, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C.A. Section 405(g), as amended, the petitioner brought this appeal in the United States District Court for the District of Puerto Rico. On October 7, 1987 the Court denied the appeal. (p. 13(a)-14, infra).

The petitioner appealed before the United States Court of Appeals for the First Circuit and on August 29, 1988 the Court entered judgment affirming the decision of the District Court. (p.9(a), infra).

On October 25, 1988 petition for rehearing was denied. (p.10(a)-11, infra).

On December 15, 1988 petitioner filed a Notice of Appeal before this Court. It is reprinted in the Appendix hereto, p. 26(a)-27, 2 pages, infra.

On January 24, 1989, Honorable William J. Brennan,Jr., Associate Justice of the Supreme Court of the United States ordered that the time for filling this petition for writ of certiorari be extended to and including March 24, 1989. (A-589), p. 28(a), infra.

The petitioner is including excerpt from 42 U.S.C.A. Section 402(e)(4) for consideration by this Court. It is re-printed in 29(a)-30, 2 pages, infra.

This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1), 2101(c) and 42 U.S.C.A. Section 405(g).

CONSTITUTIONAL, STATUTORY AND REGULATIONS PROVISIONS INVOLVED

The Constitutional, Statutory and Regulations provisions which are relevant to decision of this case are Amendments V, which provides in part:

"No person shall..... Be deprived of life, liberty or property, without due process of law....."
and Amendment XIV Section provides in part:

"..... Nor deny to any person within its jurisdiction the equal protection of the laws ....."

Judicial review of cases arising under Title II of the Social Security Act, as amended, is provided for in Section 205(g) of the Act, 42 U.S.C.A. Section 405(g), in pertinent part provides:

"(g) ..... The judgment of the Court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions....."

Section 223(d)(1)(A) of the Social Security Act, as amended, 42 U.S.C.A. Section 423(d)(1)(A) provides in part:

(d)(1) The term "disability" means-

(A) Inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months; or ....."

Congress authorizes the promulgation of regulations to the Secretary of Health and Human Services, who in turn delegates the authority to the Social Security Administration. The S.S.A. promulgates regulations as part IV and published in the Federal Register under 20 C.F.R. Section 404, Subpart P, et. seq.

STATEMENT OF THE CASE

This petitioner seeks to review the order of the Court of Appeals for the First Circuit affirming the judgment of the District Court.[1/]

On October 3, 1986 a hearing was held before an Administrative Law Judge. Dr. Victor M. Diaz-Bonet, Ophthalmologist, testified as a medical advisor for the Administrative Law Judge. He stated that

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1/ The U.S. District Judge failed to mention any law, Secretary's Regulations, nor any jurisprudence. An error of law.

the petitioner did not suffer from any impairment which met or equalled in severity a listed impairment. That petitioner is unable to work with small things.

The Administrative Law Judge found that petitioner met the age requirement and was the surviving widow of the wage earner who died fully insured on March 17, 1976. The A.L.J. further sustained the testimony from the medical advisor without mention specifically the Section of the Secretary's Regulations involved in the case.

On August 26, 1986 Petitioner submitted a medical report from Dr. Jose Luis Martínez, Cardiologist, petitioner's treating physician, who diagnosed:

1. Ventriculae arrythmia
2. Hyperlipidemia,

3. Probable coronary artery disease

4. Visual defictis.

The Administrative Law Judge found the report not pertinent for there is no evidence of allegations other than visual to be considered on or before October 1983.

During the hearing Petitioner testified that she felt very nervous, headaches migraines and difficulty with her eye sight.

On May 3, 1985 Petitioner submitted an ophthalmologist report from Dr. Bernardo de Paz Reyes and his diagnosis:

"High hyperopic astigmatism right eye ampliopia.

Left eye subnormal vision esotropia-phoria alteranating migraine episodes ocular".

On August 5, 1929 Petitioner was born. Her husband died on March 17, 1976. Petitioner was receiving mother's insurance benefits in November 1976.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.(a) Considering only that the standard of review for subjective allegation of pain in light of Section 3(a)(1) of the Social Security Disability Benefits Reform Act of 1984, Public Law No. 98-460 dated October 9, 1984, 98 STAT. 1794.

"Congress in 1984 established a new and temporary standard for evaluation of subjective evidence of pain 42 U.S.C.A. Section 423(d)(5)(A). This Circuit has held that Congress intended the new standard to apply to all cases then pending either before the Secretary or the Courts. This Court examined the relative legislation history and determined the effect of this change in the law....." (Quoting W. Rep. No. 466, 98th.Cong., 2d. Sess. 24). Mason v Bowen, 791 F.2d. 1460, 1462,(11th. Cir., 1986); Caulder v Bowen, 791 F.2d. 872, 879, (11th. Cir., 1986).

This Court should consider whether the Federal Court of Appeals err when they violate the due process of law to the petitioner denying her opportunity to review decision when she is entitled to in the same manner as other Social Security disability cases. This case is a Widow Disability Insurance Benefits that should have been considered in the same manner as any other disability cases.

Petitioner is entitled to the due process requirements for a full and fair review and the equal protection of law as a right protected by the Fifth Amendment of the Constitution of the United States. Morgan v United States, 289 U.S. 468(1936).

"It is well settled that Disability Insurance Benefits are subject to procedural due process protections."
Mathews v Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed. 2d. 18 (1976).

"Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment."

Calero-Toledo v Pearson Yacht Leasing Co., 416 U.S. 663, 668-669, N.5, (1974).

In this case Respondent applied improper legal standards.

The Court below misapplied medical vocational guidelines in determining that petitioner, who is suffering from poor vision, migraines, heart disease, was not disabled.

Bowen v City of New York, et al, 476 U.S. 467, 478, 106 S.Ct. 2022, 2025, 90 L.Ed. 426, (1986).

II Does the Court below err by holding that the Secretary's denial of petitioner's Social Security Disability Benefits is supported by substantial evidence.

The First Circuit in its denial decision considered the case "De Novo" and not in accordance with the Court's standantd of review as to whether there exists substantial evidence in the record to support the Secretary's Findings. (See 42 U.S.C.A. Section 405(g)). They failed to consider that the U.S. District Court failed to comment in its sketchy decision. Under this standard, the question is whether the record contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".

Richardson v Perales, 402 U.S. 399, 401, 91 S.Ct. 1420, 1427; 28 L.Ed. 2d. 842, (1971), quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126, (1938).

The Circuit Court cited that the earlier period to be considered is November 1983 according to 42 U.S.C.A. Section 402(e).

The ruling in the present case directly conflicts with Section 402(e)(1)(B)(1), in pertinent part provide:

"(4) The period referred to in paragraph (1)(B)(i) in the case of any widow..... is the period beginning with whichever of the following is the latest:

(A).....; or

(B) .....; or

(C) .....; or

and ending with the month before the month in which she attains age 60, or, if earlier, with the close of the eighty-fourth months following the month with which such period began." (Supp. 1988). (It is reprinted in the Appendix hereto, p. 29(a)-30, 2 pages, infra).

Petitioner attained age 50 on August 5, 1979 (date of entitlement to widow's benefits), eight-four months following the month with which such period began will be in August 1986 and not October or November 1983, as stated by the Secretary

and the Court. The medical evidence submitted by the petitioner should be considered by the Secretary and the Courts below. (Please see Section 404.335(c)(1) of the Secretary's Regulations, 20 C.F.R. Section 404.335(c)(1), (1988).

The Secretary as well as the Circuit Court's denial of petitioner's Widow Disability Benefits which was based on finding that petitioner had not severe impairment was not supported by substantial evidence, in view of lack of any explanation for review physician's "not severe" conclusion.

The Appeals Council failed to consider Section 404.969 of the Secretary's Regulations, 20 C.F.R. Section 404.969, (1988), in pertinent part provide:

> "..... Anytime within 60 days after the date of the hearing decision or dismissal, the Appeals Council itself may decide to review the action was taken..."

On November 26, 1986 Petitioner filed a Request for Review of Hearing Decision/Order before the Appeals Council.

It was not until February 24, 1987 (Ninety (90) days had elapsed), the Appeals Council sustained the denial-decision of the Administrative Law Judge.

At the same token, Section 404.971 of the Secretary's Regulations, (20 C.F.R. Section 404.971,(1988), in pertinent part provide:

"The Appeals Council will dismiss your request for review if you did not file your request within the stated period of time and the time for filing has not been extended."2/

The Appeals Council's actions on petition's review violated her right to due process as well as applicable federal regulations.

2/ The stated period of time is sixty, (60) days.

Since the Appeals Council did not address the onset of petitioner disability in its order of February 24, 1987, this Court should remands this matter to the Appeals Council for the limited purpose of deciding the issue raised by the petitioner's appeal.

"It is not function of medical advisor in Social Security Disability cases to make decision as to existence of claimed disability but rather to teach or explain complex medical data to layman examiner."

Webb v Weinberger, 371 F.Supp. 793, (D.C., Ind., 1974).

The medical advisor failed to explain the complex medical data to the Administrative Law Judge.

"Testimony of a medical advisor is entitled to less weight than the reports of any other physician who examined the claimant for a period of time."

Sherill v Secretary of H.H.S., 757 F.2d. 803, (C.A.6, 1985).

Sections 404.1578(a) and (b) of the Secretary's Regulations, (20 C.F.R. 404.1578(a) and (b),(1988), in pertinent part provides:

How we determine disability for widow.....

"(a) we will find that you are disabled and pay you widow's benefits as a widow..... if-

(1) your impairment(s) has specific clinical findings that are the same as those for any impairment in the Listings of Impairments in Appendix I or <u>any medically equivalent to those for any impairment shown there</u>;

(2) your impairment(s) meets the duration requirement." (Emphasis added).

The Secretary and the Courts below failed to consider then properly.

C O N C L U S I O N

Petitioner respectfully prays to this Court that she is entitled to the equal protection of law as expressed by the Fifth Amendment , pursuant to the Social Security Disability Benefits Reform Act.

RESPECTFULLY SUBMITTED,

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March , 1989

NO. 88-

IN THE
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OCTOBER TERM, 1988

BETSY ACOSTA,
Petitioner,

Vs.

DR. LOUIS SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CERTIFICATE OF SERVICE

I, Rafael Carreras-Valle,Esquire, a member of the Bar of this Court, hereby certify that on this th. day of March, 1989, three copies of the petition for writ of certiorari in the above-entitled case was mailed, first class postage prepaid to:

Hon. William C. Bryson
Acting Solicitor General
Department of Justice
Washington, D.C. 20530

RAFAEL CARRERAS-VALLE,ESQ.
COUNSEL FOR PETITIONER

March , 1989

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(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 88-1057

BETSY ACOSTA,

Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

(Hon. José A. Fuste, U.S. District Judge)

Before

Campbell, Chief Judge,

Coffin and Selya, Circuit Judges.

Rafael Carreras-Valle on brief for appellant. Donna J. Fuchsluger, Office of the General Counsel, Social Security Division, Department of Health and Human Services, Daniel F. Lopez Romo, United States Attorney, Donald A. Gonya, Chief Counsel for Social Security, Randolph W. Gaines, Deputy Chief Counsel for Social Security Litigation, and A. George Lowe, Chief, Disability Litigation Branch, on brief for appellee.

AUGUST 29, 1988

1(a), 9 pages

Per Curiam. Claimant applied for widow's benefits based on visual problems. The Secretary denied benefits, and claimant sought judicial review.

Claimant's main arguments seem to be that the Secretary incorrectly computed her last date of eligibility and placed too much or improper reliance on the medical advisor's testimony. We deal with these points.

1. Eligibility date. Claimant applied for benefits in February 1986 claiming disability since April 30, 1985. Benefits were initially denied on the ground that under the statute and regulations claimant's condition had to be disabling on or before March 17, 1983 in order to be eligible for benefits. Claimant thereafter amended her onset date to March 17, 1983. On further administrative review, the administrative Law Judge (ALJ) and the Appeals Council determined that the correct date before which disability

had to be established was October or November 1983, seven years after October 1975, the last month in which claimant was entitled to mother's benefits. Claimant argues that the correct date should be August 1986, by which time, claimant says, she had disc problems, coronary artery disease, ventricular arrhythmia, and depression in addition to her visual loss, ailments which the Secretary did not consider. Claimant's brief, however, contains no comprenhensible argument explaining why August 1986 should be the correct date.

The relevant regulation for calculating the eligibility date is 20 C.F.R. S 404.335 (c)(1) which provides in material part as follows:

> You may be entitled to benefits as the widow or widower of a person who was fully insured when he or she died. You are entitled to these benefits if --

> (c) You are... at least 50 years old and have a disability as defined in S 404.1577 and --
>
> (1) The disability started no later than 7 years after the insured died or 7 years after you were last entitled to mother's or father's benefits....."

Claimant's husband died March 17, 1976. Seven years from then is March 17, 1983. A form in the record (A-58) gives November 1976 as the last month of entitlement to mother's benefits. Seven years from then is November 1983. Claimant does not explain and we do not see how, claimant arrives at an August 1986 date. On the present record, we see no basis to question the Secretary's 1983 date, and as the only medical report concerning the coronary and other problems is dated August 27, 1986, the Secretary did not err in limiting the disability consideration to claimant's visual problems.

2. Reliance on medical advisor. The medical evidence consisted basically of reports from claimant's treating physicians,

Dr. Gorbea who first saw claimant in 1959, and Dr. De Pax who first saw her in March 1983. In 1959, right eye vision was 20/300, but the left eye, without correction was 20/30 and 20/20 with correction. Despite her vision problems, claimant apparently was able to function fairly well, for in 1977, shortly after her husband died, she began working, first typing and then later, when her sight worsened, filing and as a receptionist. She continued working until 1982 when the company went bankrupt. Also, she held a driver's license from at least February 1980 to February 1984. In April 1985 when Dr. DePaz examined her, right eye vision had deteriorated to 20/400 and the left eye was 20/60. Dr. De Paz wrote "her condition disables her to do work efficiently because of no Stereopis and poor fixation causing double vision when working in the near range." A year

later, in May 1986, claimant was reexamined by both Dr. gorbea and Dr. De Paz. Her right eye was 20/400 according to Dr. Gorbea. Visual acuity in the left eye with corrective lenses for distance viewing was 20/25 according to Dr. Gorbea and 20/40 according to Dr. De Paz. Corrected left eye near vision was 20/25 (Dr. Gorbea) or 20/40 (Dr. De Paz).

The medical advisor (MA), after viewing the reports, explained as follows. Claimant had a refraction defect and, as a consequence had probably been cross-eyed since birth. Due to that condition, her right eye had not developed properly and its vision was very poor. Her left eye vision was subnormal -- 20/50 he said -- which did not meet the listings. As for how the vision problem affected claimant functionally, the MA stated the following: "I suspect by the manner in which she managed her movement looking for her purse that (her vision) should be enough

in order that she could engage in routine things, and it isn't sufficient if she had to work with extremely small things, which demand a lot of concentration." He felt that from a visual point of view, claimant could hold an eight hour a day job, five days per week, as long as the work did not entail extreme concentration on close work.

As we explained in Rodriguez v. Secretary, 647 F.2d. 218, 220 (1st.Cir.1981) to be entitled to widow's benefits, the widow must have either a listed impairment or one medically equivalent to a listing. The relevant listing in this case is 20 C.F.R. Part 404, Subpart P, App. 1, S 2.02 which, in order to establish disability, requires the "(r)emaining vision in the better eye after best correction (to be) 20/200 or less." The Secretary concluded claimant's visual impairment did not meet

or equal any listing and hence denied benefits.

Claimant complains that the ALJ did not specify by number the listing he was considering and, counsel argues, the medical adivisor went beyond his proper realm (which claimant would limit to explaining medical terms) when the MA said claimant did not meet the listings.

A simple reading of the listings makes obvious which listing is relevant, and claimant has not pointed to any listing she claims to meet. Nor did the MA exceed his proper role when, after examining the treating doctors' reports, the MA explained, in essence, that under said reports, no listing was met. Rodriguez v Secretary, 647 F.2d. 218, 223-24 (1st.Cir.1981).

We find no error and conclude that the

Secretary's decision is supported by substantial evidence on the record as a whole. All of claimant's remaining arguments have been considered, but do not merit discussion.

Affirmed.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 88-1057

BETTY ACOSTA,
Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

Before

Campbell, Chief Judge,
Coffin and Selya, Circuit Judges.

ORDER OF COURT

Entered October 25, 1988

The petition for rehearing is denied. We read the last three lines of 42 U.S.C.A. S 402(e)(4), particularly the words "if earlier," to direct that the period before which disability must be established will end with the earlier of the following two dates: 1) the month before the month in

which claimant attains age 60 or 2) 84 months after the date arrived at from applying S 402(e)(4)(A), (B), or (C).

Claimant's entitlement to mother's benefits ended, according to the record, in November 1976. Eighty-four months from then was November 1983. As November 1983 is a date earlier than the month before the month in which claimant turned 60, November 1983 is therefore the date by which disability had to be established.

By the Court:

(s): Francis P. Scigliano
Clerk.

(cc: Messers. Carreras-Valle and Fuchsluger) (U.S. Attorney, U.S. Dept. of Justice and Romano)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1057

BETSY ACOSTA,
Plaintiff-Appellant,

Vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

Before

Campbell, Chief Judge,
Coffin, Bowenes, Breyer, Torruella
and Selya, Circuit Judges.

ORDER OF COURT

Entered December 16, 1988

The motion for reconsideration or for rehearing en banc is denied.

By the Court:

(s.t) FRANCIS P. SCIGLIANO
Clerk.

(cc: Mr. Carreras-Valle and
Ms. Fuchsluger)

12(a)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BETSY ACOSTA, Widow, JOSE JAIME VALLES, WE	*	
Plaintiff,	*	Civil No.
v.	*	87-0498(JAF)
SECRETARY OF HEALTH AND HUMAN SERVICES,	*	
Defendant	*	

OPINION AND ORDER

This is an action brought under section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. Sec. 405(g), to review a final determination by the Secretary of Health and Human Services ("Secretary") denying plaintiff a period of disability and disability insurance benefits.

After careful consideration of all the evidence in this case, as well as the Secretary's findings and the arguments raised by both parties, this court holds that the Secretary's decision is supported

by substantial evidence in the record as a whole. Richardson v Perales, 402 U.S. 389, 401 (1971).

By virtue of this determination, and in light of the Social Security Act and t the applicable case law and regulations, the Secretary's decision is hereby AFFIRMED.

IT IS SO ORDERED.

San Juan, puerto Rico, this 7th. day of October, 1987.

(s.) JOSE ANTONIO FUSTE

(s.t.) JOSE ANTONIO FUSTE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BETSY ACOSTA, Widow JOSE JAIME VALLES, WE Plaintiff, v. SECRETARY OF HEALTH AND HUMAN SERVICES Defendant.	*	Civil No. 87-0498(JAF)

JUDGMENT

Under the terms of an Opinion and Order entered by this court today, and in light of the Social Security Act and applicable law and regulations, judgment is hereby entered affirming the decision by the Secretary of Health and Human Services.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 7th. day of October, 1987.

(s.) JOSE ANTONIO FUSTE
(s.t.) JOSE ANTONIO FUSTE
U.S. District Judge

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR:
Betsy Acosta de Valles AKA	Widow's Insurance Benefits (Disability)
Elisa Isabel Acosta (Claimant)	
Jose J. Valles (Wage Earner)	581-09-7745 (Social Security No.

This case is before the Administrative Law Judge on a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing and the arguments presented.

ISSUES

The general issue before the Administrative Law Judge is whether the claimant is entitled to widow's insurance benefits (disability)

under sections 202(e) and 223 of the Social Security Act, as amended. The Social Security Act provides that a widow shall not be determined to be under a disability unless her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity.

The specific issues are whether the claimant has attained age 50, whether she is unmarried and whether she is under a "disability" as defined in the Act; and if so, when such "disability" commenced and the duration thereof.

APPLICABLE REGULATIONS AND EVALUATION OF THE EVIDENCE

Pursuant to the Act, the Secretary has established Social Security Administration Regulations No. 4. Section 404.1577 of the

regulations provides that for an individual to be entitled to a widow's benefits as a disabled widow, she must have a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. The impairments must be of a level of severity to prevent a person from doing any gainful activity. Age, education, and work experience are not considered in determining whether a widow is under a disability. Section 404.1578 provides that a widow who is not doing substantial gainful activity, will be found disabled if--

(1) The impairment(s) has specific clinical findings that are the same as those for any impairment in the Listing of Impairments in Appendix 1 to Subpart P of Regulations No. 4 or are medically equivalent to those for any impairment shown there;

(2) The impairment(s) meet(s) the duration requirement.

In addition, section 404.335 provides, in effect, that the disability must have started not later than 7 years after the insured died or 7 years after the claimant was last entitled to "survivor's benefits, whichever is later.

In applying the definition of disability outlined above, the Administrative Law Judge concludes that the claimant does not have an impairment which is listed in Appendix 1 and that she does not have an impairment or combination of impairments which is medically equivalent to a listed impairment. Accordingly, it must be found that the claimant is not disabled within the meaning of the Social Security Act.

The record shows that claimant was married to the wage earner for over ten years. He

died on March 17, 1976, while fully insured. The specified period referred to in Section 202(e) of the Social Security Act extends to October, 1983, seven years after she stopped receiving mother's benefits. The claimant has no prior work experience and alleges disability since April, 1985 changed to October, 1983, due to visual medical complaints. Claimant was born on August 5, 1929, and is presently fifty-seven years of age. Claimant stopped working in 1982 when the business she worked for went bankrupt.

In order to qualify for benefits as disabled widow under the Social Security Act, she must establish that she is at least fifty years of age but not sixty; that she is the widow of a wage earner who died fully insured, and, that she has physical or mental impairments which, under the regulations

promulgated by the Secretary, are deemed to be of such severity as to preclude her from engaging in any gainful activity.

The claimant's impairments must be manifest within a specified period which is seven years from the month of the insured wage earner's death, or from the month she stopped receiving mother's benefits.

The test of disability for a widow was deliberately designed to be more strict than the definition of disability which applies to an insured worker. Section 223(d)(2) of the Act specifically provides that a widow:

> "shall not be determined to be under a disability unless her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity."

Thus, a widow with an impairment or impairments which are not listed in the Appendix

1 to the Secretary's Regulations, or which are not medically the equivalent in severity to a listed impairment, cannot be found disabled. A determination of "disability", and a claim for Widow's Insurance Benefits based thereon, unlike wage earner's cases, is made without regard to non-medical factors such as age, education, and prior vocational experience--the fact that a widow has never worked or would be unable to hold productive employment is not a matter of consideration. In other words, the severity of the widow's impairment must be evaluated on the basis of medical consideration alone; impairments which do not meet or equal the level of severity in the Listing of Impairments may not serve as a basis for a finding of "disability".

At the hearing on August 27, 1986 report

(Exhibit 26) from Dr. J.L. Martínez was considered not pertinent for there is no evidence whatsoever of any allegation other than visual to be considered on or before October, 1983. Disability must be found to have occurred on or before that date.

Regarding the visual condition the medical evidence reveals there is hyperopia, astigmatism, estrabismus and amblyopia with best correction of 20/50, 20/60 in the best eye (Exhibits 24, 17, 16, 15, 14). This does not meet or equal the Listings as per the impartial medical advisor and reported findings. Claimant, thus, cannot be considered entitled to Disabled Widow's Insurance Benefits because of a visual impairment.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes

the following specific findings:

1. The claimant was born on August 5, 1929.

2. The claimant is the widow of the wage earner, who died fully insured on March 17, 1976, and the claimant is not married.

3. The period during which the claimant must establish that she is under a disability extends through November, 1983.

4. The medical findings shown in the medical evidence of record establish the existence of hyperopia, astigmatism, amblyopia OD.

5. The medical evidence of record does not establish that the claimant's impairment(s) has specific clinical findings that are the same as those for any impairment in the Listing of Impairments in Appendix 1 (20 CFR 404.1525).

6. The medical evidence of record does not establish that the claimant has any impairment or combination of impairments which is medically equivalent to an impairment listed in Appendix 1 (20 CFR 404.1526).

7. The claimant was not under a "disability, as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1578).

DECISION

It is the decision of the Administrative Law Judge that the claimant is not entitled to widow's insurance benefits (disability) under sections 202(e) and 223, respectively, of the Social Security Act.

(s) RAMON E. QUIÑONES

(s.t.) RAMON E. QUIÑONEZ
Administrative Law
Judge

October 8, 1986
Date

DEPARTMENT OF HEALTH
AND HUMAN SERVICES

SOCIAL SECURITY
ADMINISTRATION

February 24, 1987

Refer to:

SGC
581-09-7745

Office of Hearings
and Appeals
PO Box 3200
Arlington VA 22203

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Ms. Betsy Acosta
Genova A 4-4 Ext. Villa Caparra
Guaynabo, PR 00657

Dear Ms. Acosta:

The request for review of the Administrative Law Judge's Decision in your case has been considered.

Social Security Administration regulations provides that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions

are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. (These provisions are contained in 20 CFR 404.970 for Social Security claims under Title II of the Social Security Act and in 20 CFR 416.1470 for supplemental security income claims under Title XVI of the Act.)

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case.

The Appeals Council notes that the specified period for establishing that your condition was disabling ended on October 31, 1983, 7 years after October 1976, the last month in which you were entitled to mother's

benefits.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Secretary of Health and Human Services as the Defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in Section 205(g) of the Social Security Act, as amended (42 U.S.C.A. 405(g) for claims under Title II and in Section 1631(c)(3) of the Act

(42 U.S.C.A. 1383(c)(3) for claims under Title XVI.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W. Washington, D.C. 20201. (See Rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

(s) William Raffel

(s.t.) William Raffel
Member, Appeals Council

cc:

Rafael Carreras-Valle Esq.

DO, Bayamon, PR

HO, Bayamon, PR (ALJ Quiñones)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 88-1057

BETSY ACOSTA
SSN: 581-09-7745

Plaintiff-Appellant,

Vs.

SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, BETSY ACOSTA, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final Order dismissing the Petition for Rehearing entered in action on october 25, 1988.

This appeal is taken pursuan to 28 U.S.C.A. Section 2101(c).

31(a), 2 pages

At Río Piedras, Puerto Rico,

December 15, 1988.

(s) RAFAEL CARRERAS-VALLE

(s.t.) RAFAEL CARRERAS-VALLE,Esq.
Counsel for Plaintiff-
Appellant
P. O. Box 20399
Rio Piedras, P.R. 00928

PHONE (809) 767-5665

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY tha ton this same date, a copy of this Notice of Appeal to the Supreme Court of the United States was mailed to:

Donna Fuchfluger,Esquire
Office of the General Counsel
Dept. of H.H.S.
Social Security Division
Room 639 Altmeyer Bldg.
6401 Security Boulevard
Baltimore, Maryland 21235

(s) RAFAEL CARRERAS-VALLE

(s.t.)RAFAEL CARRERAS-VALLE,Esq.
Plaintiff-Appellant's Councel

December 15, 1988

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.
Clerk of the Court

Area Code 202
479-3011

January 24, 1989

Mr. Rafael Carreras-Valle
P.O. Box 20399
Rio Piedras, P.R. 00928

RE: Betsy Actosta v Secretary of Health and Human Services A-589

Dear Mr. Carreras-Valle:

Your application for an extension of time to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Brennan, who on January 24, 1989, signed an order extending your time to and including March 24, 1989.

A copy of the Justice's order is enclosed.

Very truly yours,

(s.t.) JOSEPH F. SPANIOL, JR.
CLERK

33(a), 2 pages

By:

(s.) Francis J. Lorson

Francis J. Lorson
(s.t.) Chief Deputy Clerk

lg

CC: Solicitor General
Clerk, USCA 1st-Circuit
(No. 88-1057)

EXCERPT FROM 42 U.S.C.A. SECTION 402(e)(4)

(e) Widow's insurance benefits

(1) The widow (as defined in section 416(c) of this title) and every surviving divorced wife (as defined in section 416(d) of this title) of an individual who died a fully insured individual, if such widow or such surviving divorced wife--

(A) is not married,

(B)(i) has attained age 60 or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (4),

* * *

(4) The period referred to in paragraph (1)(B)(ii), in the case of any widow or surviving divorced wife, is the period

beginning with whichever of the following is the latest:

(A) the month in which occurred the death of the fully insured individual referred to in paragraph (1) on whose wages and self-employment income her benefits are or would be based or

(B) the last month for which she was entitled to mother's insurance benefits on the basis of the wages and self-employment income of such individual, or

(C) the month in which a previous entitlement to widow's insurance benefits on the basis of such wages and self-employment income terminated because her disability had ceased,

and ending with the month before the month in which she attains age 60, or, if earlier, with the close of the eighty-fourth month following the month with which such period began.